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IDAHO PUBLIC UTILITIES COMMISSION

**JENNIFER M. REINHARDT-TESSMER**  
Corporate Counsel  
[jreinhardt@idahopower.com](mailto:jreinhardt@idahopower.com)

December 4, 2013

**VIA HAND DELIVERY**

Jean D. Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
Boise, Idaho 83702

Re: Case No. IPC-E-13-23  
Approval of Special Contract Terms with J. R. Simplot Company – Idaho Power Company's Application

Dear Ms. Jewell:

Enclosed for filing in the above matter are an original and seven (7) copies of Idaho Power Company's Application for Approval of Special Contract Terms with J. R. Simplot Company.

Sincerely,

Jennifer M. Reinhardt-Tessmer

JRT:csb  
Enclosures

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LISA D. NORDSTROM (ISB No. 5733)  
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IDAHO PUBLIC UTILITIES COMMISSION

Attorneys for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF IDAHO POWER )  
COMPANY'S APPLICATION FOR ) CASE NO. IPC-E-13-23  
APPROVAL OF SPECIAL CONTRACT )  
BETWEEN IDAHO POWER COMPANY ) IDAHO POWER COMPANY'S  
AND J. R. SIMPLOT COMPANY. ) APPLICATION FOR APPROVAL  
 ) OF SPECIAL CONTRACT TERMS  
 ) WITH J. R. SIMPLOT COMPANY  
 )  
 )

Idaho Power Company ("Idaho Power" or "Company"), in accordance with RP 52 and *Idaho Code* §§ 61-501, 61-502, and 61-503, hereby requests that the Idaho Public Utilities Commission ("Commission") issue an order approving special contract terms for electric service between Idaho Power and the J. R. Simplot Company ("Simplot") for Simplot's Caldwell facility.<sup>1</sup> Idaho Power and Simplot have reached an agreement as to nearly all of the terms and conditions of the contract, but have reached an impasse on certain provisions regarding limitations on liability (Sections 11.2–11.4). Therefore,

<sup>1</sup> Currently, Idaho Power and Simplot have a special contract for Simplot's Don Plant located in Pocatello, Idaho ("Don Plant special contract"), which enables Simplot to use in excess of 20,000 kilowatts ("kW") of energy at that location, in accordance with the terms set forth in the Don Plant special contract (approved by the Commission in Case No. IPC-E-04-17, Order No. 29576).

Idaho Power hereby requests an order approving the special contract as proposed by the Company in the concurrently filed Attachment 1 (“Proposed Special Contract”), without change or condition. Attachment 2 to this Application is the proposed tariff, which shows the billing components associated with the Proposed Special Contract.<sup>2</sup>

## **I. BACKGROUND**

Large power service customers that register a metered demand of 1,000 kW or more per Billing Period<sup>3</sup> for three or more Billing Periods during the most recent 12 consecutive Billing Periods are required to take service according to the terms in Schedule 19. See I.P.U.C. No. 29, Tariff No. 101, Schedule 19. Customers for which Schedule 19 is applicable, who contract for firm electric Demand of 10,000 kW to 20,000 kW may optionally take service under a mutually agreed upon special contract between the customer and the Company, if approved by the Commission. *Id.* Additionally, once a customer’s firm electric Demand exceeds 20,000 kW, the customer becomes ineligible for Schedule 19 service and must make special contract arrangements, as described in Schedule 19. *Id.*

In addition to the Don Plant, Simplot owns a plant at or near Caldwell, Idaho, which has recently been expanded,<sup>4</sup> and that currently consumes no more than 20,000 kW of energy provided by Idaho Power (and is therefore subject to Schedule 19). Based on communications with Simplot representatives, it is the Company’s understanding that Simplot anticipates an energy need in excess of 20,000 kW in the

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<sup>2</sup> On November 26, 2013, Idaho Power presented the tariff to Simplot for its review.

<sup>3</sup> A Billing Period, as referenced in Schedule 19, is the period intervening between meter readings and shall be approximately 30 days. Electric service covering 27-36 days inclusive will be considered a normal billing period. I.P.U.C. No. 29, Tariff No. 101, Rule B (Definitions).

<sup>4</sup> It is the Company’s understanding that the new Caldwell plant replaces the existing Caldwell plant and consolidates the activities of the Nampa and Aberdeen facilities at the Caldwell location.

near future. In the spring of 2013, a Simplot representative contacted Idaho Power with a request to enter into negotiations for a special contract for the Caldwell plant. In response to Simplot's request, Idaho Power drafted a special contract for Simplot's consideration. The duties and risks the Company agreed to assume in the Proposed Special Contract directly impacted the proffered cost-of-service. Simplot proposed several changes and, over the next several months, representatives from Simplot and Idaho Power engaged in an in-person meeting, a telephone conference, and exchanged several e-mails discussing and negotiating the terms of the special contract. Ultimately, Idaho Power agreed to several of Simplot's proposed changes and the parties were able to come to an agreement as to the terms of the Proposed Special Contract, with the exception of Sections 11.2–11.4, which place limits on both parties' liability. Those provisions, as originally proposed by Idaho Power, are as follows:

11.2. EACH PARTY EXPRESSLY AGREES THAT NEITHER PARTY NOR ITS AFFILIATES WILL UNDER ANY CIRCUMSTANCES BE LIABLE UNDER ANY THEORY OF RECOVERY, WHETHER BASED IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), UNDER WARRANTY, OR OTHERWISE, FOR: ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL LOSS OR DAMAGE OR PUNITIVE DAMAGES WHATSOEVER; LOSS OF PROFITS OR REVENUE; LOSS OF USE OF MATERIAL OR EQUIPMENT; OR INCREASED COSTS OF CAPITAL AND FUEL COST; PROVIDED, HOWEVER, THAT NOTHING IN THIS PARAGRAPH 11.2 SHALL BE CONSTRUED TO LIMIT SIMPLOT'S PAYMENT OBLIGATIONS TO IDAHO POWER.

11.3. EACH PARTY AGREES UNDER NO CIRCUMSTANCES SHALL THE TOTAL AGGREGATE CLAIMS AGAINST AND LIABILITY OF THE OTHER PARTY FOR DIRECT DAMAGES, UNDER ANY THEORY OF RECOVERY, WHETHER BASED IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), OR

OTHERWISE, EXCEED ONE HUNDRED PERCENT (100%) OF THE TOTAL CHARGES PAID BY SIMPLOT TO IDAHO POWER UNDER THIS CONTRACT UNDER ANY GIVEN CALENDAR YEAR; PROVIDED, HOWEVER, THAT THIS LIMITATION OF LIABILITY SHALL NOT LIMIT SIMPLOT'S PAYMENT OBLIGATIONS TO IDAHO POWER UNDER THIS AGREEMENT.

11.4. EXCEPT AS PROVIDED IN THIS AGREEMENT, IDAHO POWER MAKES NO WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION, THOSE OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE WORK AND SERVICES PROVIDED HEREUNDER.

Simplot rejected these provisions, specifically objecting to a bilateral waiver of indirect, special, and consequential damages ("consequential damages") and a limitation on direct damages, Sections 11.2 and 11.3, respectively. In explanation, Simplot stated in one of the revised contract drafts that was exchanged, that the "true costs of this . . . would be hundreds of millions of dollars." Idaho Power has explained that this is exactly the reason the Company cannot assume that risk. In an effort of compromise, the Company agreed to raise the ceiling on the Company's potential liability for direct damages an additional 50%, as reflected in the Proposed Special Contract. See Attachment 1.

On November 19, 2013, counsel for Simplot and Idaho Power had a teleconference in an attempt to come to an agreement on the disputed liability paragraphs in Section 11. Despite Idaho Power's best efforts, a mutually agreeable resolution could not be reached. Simplot proposed that Rule J replace Sections 11.2 and 11.3, which the Company rejected as an insufficient limitation of potential liability for this special contract. In another exchange, Simplot proposed the language in the Micron special contract from approximately 13 years ago, which was silent as to

consequential damages and direct damages.<sup>5</sup> Idaho Power reiterated its position that it would not be appropriate to subject the Company and its customers to undue risk for liability related to Simplot's business, which included the risk of consequential damages and unlimited direct damages. Further, Idaho Power is continuously reviewing and enhancing its contracts, and today's market standards for such contracts include such provisions limiting liability. Ultimately, it was determined that intervention by the Commission would be necessary.

## **II. REQUEST FOR APPROVAL BY THE COMMISSION OF THE COMPANY'S PROFFERED TERMS**

The Commission has the express statutory jurisdiction and authority over utility rates, any contracts affecting such rates, and the power and authority to hear complaints and investigate any single rate, contract, or practice of a utility. I.C. §§ 61-501–61-503. Specifically, the Commission has jurisdiction, upon its own motion or complaint, to evaluate and order just or reasonable rates and contracts relating to rates. I.C. § 61-502. Further, the Idaho Supreme Court has recognized that the Commission may interpret contractual provisions, which may normally be within the jurisdiction of the courts, upon the consent of the parties for the Commission to hear such matters. *Afton Energy, Inc., v. Idaho Power Co.*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986) quoting *Bunker Hill Co. v. Washington Water Power Co.*, 98 Idaho 249, 252, 561 P.2d

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<sup>5</sup> The specific provision of the Micron special contract that Simplot proposed in lieu of 11.2-11.4 of the Proposed Special Contract is as follows: "Each party agrees to protect, defend, indemnify and hold harmless the other party, its officers, directors, and employees against and from any and all liability, suits, loss, damage, claims, actions, costs, and expenses of any nature, including court costs and attorney's fees, even if such suits or claims are completely groundless, as a result of injury to or death of any person or destruction, loss or damage to property arising in any way in connection with, or related to, this Agreement, but only to the extent such injury to or death of any person or destruction, loss or damage to property is not due to the negligence or other breach of legal duty of such other party; provided, however, that each party shall be solely responsible for claims of and payment to its employees for injuries occurring in connection with their employment or arising out of any workman's compensation law."

391,394 (1977). The Idaho Supreme Court has specifically recognized the Commission's authority to "use its expertise and supply a reasonable contract rate" where the parties were unable to agree to terms in a special contract. *Afton*, 111 Idaho at 929 citing *FMC Corp. v. Idaho Public Utilities Commission*, 104 Idaho 265, 658 P.2d 936 (1983). Indeed, in the past, when a customer and utility have not been able to successfully negotiate a special contract for electric service, the Commission has set appropriate special contract rates and terms upon petition of the utility.<sup>6</sup>

In this case, Idaho Power has made every effort to negotiate a mutually acceptable special contract with Simplot; however, the parties are at an impasse regarding the allocation of risk for potential liability. Both parties agree that potential direct and consequential damages related to the supply of energy to Simplot's Caldwell facility could be astronomical. This is precisely why the assumption of risk for liability is a critical element to energy contracts like the one at hand, and directly impacts the other special contract terms, including, but not limited to, the Company's proffered cost-of-service.

Simplot's suggestion that Rule J should replace the disputed contract provisions is unacceptable, as Rule J is simply insufficient to adequately reduce the risk for the Company and its customers of potential liability under a special contract. Rule J limits the Company's liability for interruption of service caused by acts of God (commonly known as *force majeure* provisions) and the Company's "repair, maintenance, improvement, renewal or replacement work"; it does not adequately limit contract and warranty claims, and explicitly states that "the provisions of this rule do not affect any

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<sup>6</sup> See *In the Matter of the Application of PacifiCorp dba Utah Power & Light Company for Approval of Interim Provisions for the Supply of Electric Service to Monsanto Co.*, Case No. PAC-E-01-16, Final Order No. 29157.

person's rights in tort." See I.P.U.C. No. 29, Tariff No. 101, Rule J. The current market standard is clear—utilities do not assume the risk for consequential damages and unlimited direct damages.<sup>7</sup> In fact, Simplot itself agreed to a waiver of consequential damages in the Don Plant special contract. See *In the Matter of the Application of Idaho Power Co. for Approval of an Agreement for Electric Service Between Idaho Power Co. and the J.R. Simplot Co.*, IPC-E-04-17 (Application and related Order No. 29576). Indeed, Idaho Power has been party to numerous energy contracts in recent years that contain a provision waiving consequential damages and limiting direct damages. Based on a review of just those documents that are publicly available, Simplot's own contracts provide for a waiver of consequential damages and limitation on direct damages from the terms of use governing its website ([http://www.simplot.com/terms\\_conditions](http://www.simplot.com/terms_conditions)) to the terms that govern the use of its product ([http://techsheets.simplot.com/Partners/Six\\_Iron.pdf](http://techsheets.simplot.com/Partners/Six_Iron.pdf)).

The Company requests a ruling from the Commission approving the Proposed Special Contract, finding that if Simplot's energy needs exceed 20,000 kW of electricity at its Caldwell plant, Simplot would have to abide by its terms. Alternatively, should the

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<sup>7</sup> For example, in Idaho Power's contract for construction of its Langley Gulch power plant, direct damages were limited to 25% of the contract price (Section 26.1(a)) and there was a complete waiver of incidental, punitive, and consequential damages (Section 26.2); see also *In the Matter of the Application of Idaho Power Co. for Approval of a Special Contract to Supply Electrical Power to Hoku Materials, Inc.*, IPC-E-08-21 (Section 12 provided that "Neither party shall, in any event, be liable to the other for any special, incidental, exemplary, punitive, or consequential damages," approved in Order No. 30697; *In the matter of the Application of Idaho Power Co. and FMC Corporation for Approval of a Special Contract for Service*, IPC-E-97-13 (Section 14.2 provided that damages are limited to actual damages caused by the Company and does not include consequential or indirect damages); *In the Matter of the Application of PacifiCorp, dba Rocky Mountain Power for Approval of an Electric Service Agreement with Monsanto Company*, PAC-E-06-09 (Section 10.2 providing that "PacifiCorp shall not be liable for any physical damages, economic losses, costs, or damages resulting therefrom, including but not limited to special, indirect, incidental, consequential, punitive or exemplary damages."), approved in Order No. 30197; *In the Matter of the Joint Petition of Avista Corporation and Potlatch Corporation for Approval of Power Purchase and Sale Agreement*, AVU-E-02-08 (Section 13 providing for waiver of "any special, incidental, punitive, exemplary or consequential loss or damage whatsoever").

Commission determine that it is prudent for the Company to assume the risk for unlimited direct damages and consequential damages associated with Simplot's business, Idaho Power requests an opportunity to re-examine the terms of the special contract, including, but not limited to, an appropriate cost-of-service, that appropriately reflect this assumption of risk.

### **III. CONCLUSION**

Idaho Power and its customers should not be exposed to undue risk of unlimited direct damages and consequential damages related to Simplot's business. Idaho Power has set forth reasonable limitation of liability language in the Proposed Special Contract that is consistent with prudent energy contract procedures and market standards. Idaho Power respectfully requests that the Commission approve the Proposed Special Contract terms, without change or condition.

DATED at Boise, Idaho, this 4<sup>th</sup> day of December 2013.



JENNIFER M. REINHARDT-TESSMER  
Attorney for Idaho Power Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4<sup>th</sup> day of December 2013 I served a true and correct copy of IDAHO POWER COMPANY'S APPLICATION FOR APPROVAL OF SPECIAL CONTRACT TERMS WITH J. R. SIMPLOT COMPANY upon the following named parties by the method indicated below, and addressed to the following:

**J. R. Simplot Company**

Peter J. Richardson  
Gregory M. Adams  
RICHARDSON ADAMS, PLLC  
515 North 27<sup>th</sup> Street (83702)  
P.O. Box 7218  
Boise, Idaho 83707

Hand Delivered  
 U.S. Mail  
 Overnight Mail  
 FAX  
 Email [peter@richardsonadams.com](mailto:peter@richardsonadams.com)  
[greg@richardsonadams.com](mailto:greg@richardsonadams.com)

  
Christa Beary, Legal Assistant

**BEFORE THE  
IDAHO PUBLIC UTILITIES COMMISSION  
CASE NO. IPC-E-13-23**

**IDAHO POWER COMPANY**

**ATTACHMENT 1  
PROPOSED SPECIAL CONTRACT**

SPECIAL CONTRACT FOR ELECTRIC SERVICE  
BETWEEN  
IDAHO POWER COMPANY  
AND  
SIMPLOT (CALDWELL, IDAHO)

THIS AGREEMENT FOR ELECTRIC SERVICE ("Agreement") is entered into by J.R. Simplot Company, a Nevada Corporation ("Simplot") and IDAHO POWER COMPANY, an Idaho Corporation ("Idaho Power") and is dated December \_\_\_\_, 2013. The undersigned may also be referred to individually as a "Party" or collectively as the "Parties." In consideration of the mutual covenants hereinafter set forth, the Parties hereby agree as follows:

SECTION 1 — DEFINITIONS

1.1. "Billing Demand" shall mean the kilowatts supplied to the Simplot Facility during the coincident 15-consecutive-minute period of maximum use during the monthly billing period, adjusted for power factor, as measured by Idaho Power's metering equipment located at the Simplot Facility.

1.2. "Commission" shall mean the Idaho Public Utilities Commission or its successor agency.

1.3. "Contract Demand" shall mean the monthly schedule of kilowatts Idaho Power has agreed to make available to the Simplot Facility in accordance with this Agreement. The Contract Demand may vary pursuant to Section 5.

1.4. "Construction Agreement" shall have the meaning set forth in Section 6.

1.5. "Excess Demand" shall mean Billing Demand in excess of the Contract Demand.

1.6. "Interconnection Facilities" shall mean all facilities that are reasonably required by Prudent Electrical Practices and the National Electric Safety Code to interconnect and deliver electrical power and energy to the Point of Delivery at the Simplot Facility, including, but not limited to, transmission facilities, substation facilities and metering equipment.

1.7. "Minimum Monthly Billing Demand" shall have the meaning set forth in paragraph 5.2.3.

1.8. "Notice" as used in this agreement shall mean written notice delivered to the other Party by a recognized commercial courier, addressed as set forth below. Such notice will be deemed given as of the date of receipt.

1.8.1. To Idaho Power:

Idaho Power Company  
ATTN: Vice President of Regulatory Affairs  
P.O. Box 70  
Boise, Idaho 83707

1.8.2. To Simplot:

J.R. Simplot Company  
ATTN: Director, Energy  
P.O. Box 27  
Boise, ID 83702

1.9. "Point of Delivery" shall mean the location(s) specified in paragraph 4.2 where the electrical facilities owned by Simplot are interconnected to the electrical facilities owned by Idaho Power and where power and energy are delivered by Idaho Power for the purpose of providing electrical service for the operations of the Simplot Facility.

1.10. "Prudent Electrical Practices" shall mean those practices, methods, and equipment that are commonly and ordinarily used in electrical engineering and utility operation to operate electrical equipment and deliver electric power and energy with safety, dependability, efficiency and economy.

1.11. "Schedule 33" shall mean the Simplot Facility tariff schedule of rates and charges or its successor schedules approved by the Commission.

1.12. "Simplot Facility" shall mean the Simplot manufacturing complex located near or at 16551 Simplot Boulevard, Caldwell, Idaho.

1.13. "Termination Charges" shall have the meaning set forth in Section 3.2.

1.14. "Total Maximum Contract Demand" shall mean the upper limit of 50,000 kilowatts of monthly contract demand Idaho Power will make available to the Simplot Facility pursuant to this Agreement.

## SECTION 2 — TERM OF AGREEMENT

This Agreement shall remain in effect until either Simplot or Idaho Power terminates this Agreement as provided in Section 3.

## SECTION 3 — TERMINATION

3.1. Notice of Termination by Simplot. Simplot shall have the right to terminate this Agreement for its convenience and without cause by delivering twelve (12) months advance written Notice of termination to Idaho Power. The Notice of termination shall set forth the effective date of termination, which shall be no earlier than twelve (12) months after Simplot delivers the written Notice of termination.

3.2. Termination Charges. Simplot shall reimburse Idaho Power for Idaho Power's costs associated with the termination of this Agreement ("Termination

Charges"). Termination Charges shall be limited to the net book value (original cost less depreciation) of the Interconnection Facilities paid for by Idaho Power plus the cost of the removal and transport to storage of surplus Interconnection Facilities, if any, less a credit, for any residual value of the surplus Interconnection Facilities. Termination Charges will not be assessed for investment costs of Interconnection Facilities paid for by Simplot. Idaho Power shall deduct from the Termination Charges any credits due and owing to Simplot under the terms of this Agreement. Nothing in this paragraph 3.2 shall prevent either Party from asserting any rights or claims under this Agreement or otherwise. Subsequent to giving or receiving a termination Notice as described in paragraph 3.1, Idaho Power will invoice Simplot for any Termination Charges known at that time. Termination Charges shall be due and payable within fifteen (15) calendar days of Simplot's receipt of the invoice.

3.3. Notice of Termination by Idaho Power. Idaho Power shall have the right to terminate this Agreement and negotiate a new agreement for its convenience and without cause by delivering eighteen (18) months advance written Notice to Simplot. The Notice shall set forth the effective date of termination of the Agreement, which shall be no earlier than eighteen (18) months after Idaho Power delivers the written Notice. Any new agreement negotiated and agreed to by the Parties shall be subject to final approval by the Idaho Public Utilities Commission.

#### SECTION 4 — SERVICES TO BE PROVIDED

4.1. Supply Obligation. In accordance with Prudent Electrical Practices and subject to the provisions of this Agreement, Idaho Power will furnish Simplot's total requirements for electric power and energy at the Simplot Facility. Before Idaho Power commences electric service and as an ongoing condition of service, Simplot's loads must satisfy the harmonic control requirements set forth in Idaho Power's Rule K approved by the Commission and the current Institute of Electrical and Electronic Engineers (IEEE) Standard 519. Simplot will not resell any portion of the power and energy furnished under this Agreement.

4.2. Point of Delivery. Electric power and energy shall be delivered by Idaho Power via four 12.5 kilovolt distribution feeders to each point generally described as the X-1 disconnect switch(es) at the Simplot Facility.

4.3. Description of Electric Service. Idaho Power shall supply three-phase, 60 HZ alternating current at nominal 12,500 volts, with a maximum steady state variation of plus or minus five percent (5%) under normal system conditions. Consistent with Prudent Electrical Practices, Idaho Power will operate within the capability of its existing system to minimize voltage level fluctuations, the normal frequency variation to be within plus or minus 0.05 HZ on a 60 HZ base. Idaho Power's maximum steady state variation of plus or minus five percent (5%) and the voltage level fluctuations may vary in the event of abnormal system conditions.

#### SECTION 5 — CONTRACT DEMAND

5.1. Contract Demand. Idaho Power agrees to initially provide the Simplot Facility 30,000 kilowatts of Contract Demand.

5.2. Changes to Contract Demand. Under no circumstances will Simplot be allowed to increase the Contract Demand above the Total Maximum Contract Demand of 50,000 kilowatts.

5.2.1. Changes during the first twelve (12) months after execution of this contract. During this period, to facilitate actual production and energy consumption history, Simplot will be able to change (increase or decrease) the contract demand by 1,000 kilowatts per month with 30 days written notice and up 5,000 kilowatts (+/-) per month with three (3) months written notice up to a total increase of 10,000 kilowatts during the first year. Increases beyond 10,000 kilowatts during the first year may be possible, but Simplot must notify and Idaho Power must agree to these additional increases.

5.2.2. Changes after the first twelve (12) months.

a. Increases to Contract Demand. Under the terms of this Agreement, Simplot may increase the Contract Demand above the 30,000 kilowatts of Contract Demand, in even increments of 1,000 kilowatts. If the increase in Contract Demand is between 1,000 kilowatts and 10,000 kilowatts, Simplot shall provide Notice to Idaho Power of its desire to increase its Contract Demand at least six (6) months in advance of the first day of the month it desires the additional capacity to be made available. If the increase in Contract Demand is greater than 10,000 kilowatts, Simplot shall provide Notice to Idaho Power of its desire to increase its Contract Demand at least twelve (12) months in advance of the first day of the month it desires the additional capacity to be made available. The new Contract Demand will not be decreased for a minimum of six (6) months. Simplot shall not increase its Contract Demand more than 15,000 kilowatts in any twelve (12) month period.

b. Decreases to Contract Demand. Simplot may decrease the Contract Demand in even increments of 1,000 kilowatts. Simplot will provide Idaho Power Notice of Simplot's desires to decrease its Contract Demand at least three (3) months in advance of the first day of the month in which Simplot desires its decreased Contract Demand to be effective. Simplot cannot decrease its Contract Demand more than 15,000 kilowatts in any twelve (12) month period.

5.2.3. Minimum Monthly Billing Demand. The minimum monthly billing demand will be the Contract Demand less 10,000 kilowatts.

5.2.4. Excess Demand. Idaho Power does not guarantee or warrant the availability of Excess Demand. If there is Excess Demand at the Simplot Facility, Idaho Power may curtail service to the Simplot Facility at Idaho Power's sole discretion. Idaho Power reserves the right to install, at any time at Idaho Power's sole discretion and at Simplot's expense, any device necessary to protect Idaho Power's system from damage that may be caused by Excess Demand pursuant to prudent electrical practices as described in paragraph 1.10 above. Simplot will be responsible for any costs or damages related to Idaho Power's system, or any costs or damages related to third parties resulting from Excess Demand. Simplot agrees to use its best reasonable efforts to monitor its electric loads and to advise Idaho Power as soon as possible of the potential for Excess Demand. In the event Idaho Power decides, in its sole discretion, to make power available to satisfy Excess Demand, the costs charged to Simplot for such Excess Demand will be subject to the Daily Excess Demand Charge specified in the then-current Schedule 33.

## SECTION 6 — FACILITIES FOR DELIVERY TO SIMPLOT FACILITY

6.1. Facilities. The Parties acknowledge that they have separately entered into the Agreement for the Construction of the Simplot Transformer Addition and Associated Facilities ("Construction Agreement"), pursuant to which Simplot has paid Idaho Power to construct the Interconnection Facilities necessary to provide up to the Total Maximum Contract Demand under this Agreement. In the event that additional transmission and/or substation Interconnection Facilities are required to provide service pursuant to Section 5.2.1(a) above, Idaho Power may require Simplot to enter into a separate agreement that will require Simplot to pay the costs for such additions if necessary to provide the service.

6.2. Operation and Maintenance. Idaho Power will operate and maintain Interconnection Facilities necessary to provide service to the Simplot Facility. Such Interconnection Facilities include Interconnection Facilities paid for by Simplot, including those paid for by Simplot pursuant to the Construction Agreement. Idaho Power shall operate and maintain such Interconnection Facilities in accordance with Prudent Electrical Practices.

## SECTION 7 — CHARGES TO BE PAID BY SIMPLOT TO IDAHO POWER

7.1. Rates and Charges. The rates and charges for electrical power, energy, and other service provided by Idaho Power to the Simplot Facility will be identified by component in the then-current Schedule 33. Simplot shall pay Idaho Power the sum of the components identified on the then-current Schedule 33 for Idaho Power to provide electric service to the Simplot Facility

7.2. Power Factor. During the first twelve-month period after the contract is approved, when the Simplot Facility's adjusted power factor is less than 90 percent during the 15-consecutive-minute period of maximum use for the monthly billing period as measured by Idaho Power, Idaho Power will adjust the Billing Demand by multiplying the metered demand in kilowatts by 0.90 and dividing that product by the adjusted power factor. After this period, when the Simplot Facility's adjusted power factor is less than 95 percent during the 15-consecutive-minute period of maximum use for the monthly billing period as measured by Idaho Power, Idaho Power will adjust the Billing Demand by multiplying the metered demand in kilowatts by 0.95 and dividing that product by the adjusted power factor. The reactive component of the adjusted power factor is comprised of the reactive load plus the 138/12.5 kV transformer reactive losses reduced by the amount of reactive correction paid for by Simplot.

7.3. Billing and Metering Provisions. Billing Demand at the Simplot Facility shall be determined on a 15 minute coincidental basis as measured by Idaho Power and shall be paid by Simplot accordingly. Idaho Power will install suitable metering equipment so that coincident Billing Demand and energy consumption can be determined for the billing period. Idaho Power shall make 15-minute interval period energy use data available to Simplot for data and billing analysis purposes. Data can be provided by pulse output at the metering location in the substation and/or as an electronic file at the time of billing. Simplot would be responsible for the installation and maintenance associated with retrieving the meter pulse output and transmitting it from the substation to their end use location. Idaho Power will allow Simplot to install and maintain power quality meters in the substation metering circuits to provide for their

power quality monitoring needs. The installation and maintenance of the Simplot power quality meters and any remote communication equipment for those meters is the sole responsibility of Simplot. Access to the station to service or maintain their equipment will be facilitated by Idaho Power with 48 hours notice.

#### SECTION 8 — PAYMENT OF BILLS/SETTLEMENTS

8.1. Billing Data. Simplot shall pay Idaho Power for all services and work provided under this Agreement. Invoices for payment for electric services shall be prepared and submitted to Simplot monthly. All invoices or bills shall contain such data as Idaho Power deems reasonably required to substantiate the billing, including without limitation, statements of the meter reading at the beginning and end of the billing period, meter constants, and consumption during the billing period.

8.2. Payment Procedure. Simplot shall pay all invoices hereunder within fifteen (15) days following Simplot's receipt of such invoice. Simplot shall make payment by electronic transfer of funds to a location designated by Idaho Power. Idaho Power will provide Simplot with current ABA routing numbers and other necessary instructions to facilitate the electronic transfer of funds. Late payment charges will be assessed in accordance with Idaho Power's then-current Rule G and Schedule 66.

#### SECTION 9 — ACCESS TO PREMISES

During the term of this Agreement, and for a reasonable period deemed necessary by Idaho Power following termination, Simplot hereby grants Idaho Power, without cost to Idaho Power, a perpetual easement (unless terminated in accordance with Section 3 herein) to access the Simplot Facility premises and other related areas at all times for the purposes of operating Idaho Power facilities, making installations, repairing and removing Idaho Power equipment, and for other purposes deemed necessary by Idaho Power to perform work under this Agreement. Idaho Power will make reasonable efforts to notify Simplot prior to accessing Simplot Facility premises, acknowledging however, that timeliness in accessing the equipment may be of high importance.

#### SECTION 10 — ASSIGNMENT

This Agreement shall be binding upon the heirs, legal and personal representatives, successors and assigns of the parties hereto. Simplot shall not assign any part of this Agreement without the express written consent of Idaho Power, which shall not be unreasonably withheld.

#### SECTION 11 — INDEMNIFICATION, LIMITATION OF LIABILITY, AND EXCLUSIVITY OF WARRANTIES

11.1. If one of the Parties is negligent related to this Agreement ("Negligent Party") and that negligence causes liability, liens, suits, loss, damage, claims, actions, costs, and expenses of any nature (collectively "Damages"), the Negligent Party agrees to protect, defend, indemnify and hold harmless the other party and its successors and their officers, directors, employees, affiliates, and agents, from,

for, and against any and all Damages resulting from the negligence, whether actual or merely alleged, including court costs and attorney's fees. If both parties are negligent, they shall be responsible for resulting Damages in proportion to their negligence.

11.2. EACH PARTY EXPRESSLY AGREES THAT NEITHER PARTY NOR ITS AFFILIATES WILL UNDER ANY CIRCUMSTANCES BE LIABLE UNDER ANY THEORY OF RECOVERY, WHETHER BASED IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), UNDER WARRANTY, OR OTHERWISE, FOR: ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL LOSS OR DAMAGE OR PUNITIVE DAMAGES WHATSOEVER; LOSS OF PROFITS OR REVENUE; LOSS OF USE OF MATERIAL OR EQUIPMENT; OR INCREASED COSTS OF CAPITAL AND FUEL COST; PROVIDED, HOWEVER, THAT NOTHING IN THIS PARAGRAPH 11.2 SHALL BE CONSTRUED TO LIMIT SIMPLOT'S PAYMENT OBLIGATIONS TO IDAHO POWER.

11.3. EACH PARTY AGREES UNDER NO CIRCUMSTANCES SHALL THE TOTAL AGGREGATE CLAIMS AGAINST AND LIABILITY OF THE OTHER PARTY FOR DIRECT DAMAGES, UNDER ANY THEORY OF RECOVERY, WHETHER BASED IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), OR OTHERWISE, EXCEED ONE HUNDRED FIFTY PERCENT (150%) OF THE TOTAL CHARGES PAID BY SIMPLOT TO IDAHO POWER UNDER THIS CONTRACT UNDER ANY GIVEN CALENDAR YEAR; PROVIDED, HOWEVER, THAT THIS LIMITATION OF LIABILITY SHALL NOT LIMIT SIMPLOT'S PAYMENT OBLIGATIONS TO IDAHO POWER UNDER THIS AGREEMENT.

11.4. EXCEPT AS PROVIDED IN THIS AGREEMENT, IDAHO POWER MAKES NO WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION, THOSE OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE WORK AND SERVICES PROVIDED HEREUNDER.

#### SECTION 12 — MODIFICATIONS OF CONTRACT

This Agreement represents the entire understanding and agreement between the Parties with respect to the subject matter of this Agreement. The Parties may amend or modify this Agreement only by a written instrument executed by the Parties.

#### SECTION 13 — COMMISSION JURISDICTION

13.1. This Agreement and the respective rights and obligations of the Parties hereunder, shall be subject to (1) Idaho Power's General Rules and Regulations as now or hereafter in effect and on file with the Commission, and (2) to the jurisdiction and regulatory authority of the Commission and the laws of the State of Idaho.

13.2. Idaho Power and Simplot agree that the rates set forth in this Agreement and the then-current Schedule 33 are subject to the continuing jurisdiction of the Idaho Public Utilities Commission ("Commission"). Idaho Power and Simplot agree that the rates under this Agreement are subject to change and revision by order of the Commission upon a finding, supported by substantial competent evidence, that such rate change or revision is just, fair, reasonable, sufficient, non-preferential, and nondiscriminatory. It is the Parties' intention by such provision that the rate making

standards to be used in making any revisions or changes in rates, and the judicial review of any revisions or changes in rates, will be the same standards that are applicable to Idaho Power intrastate tariff rates.

#### SECTION 14 — COMMISSION APPROVAL

This Agreement is subject to, and shall become effective upon, the approval by the Commission of all terms and provisions hereof without change or condition.

#### SECTION 15 — FORCE MAJEURE

As used in this Agreement, "Force Majeure" or "an event of Force Majeure" means any cause beyond the control of a Party which, despite the exercise of due diligence, such Party is unable to prevent or overcome. Force Majeure includes, but is not limited to, acts of God, fire, flood, storms, wars, hostilities, civil strife, strikes and other labor disturbances, earthquakes, fires, lightning, epidemics, sabotage, or changes in law or regulation occurring after the effective date, which, by the exercise of reasonable foresight such party could not reasonably have been expected to avoid and by the exercise of due diligence, it shall be unable to overcome. If either Party is rendered wholly or in part unable to perform its obligations under this Agreement because of an event of Force Majeure, both Parties shall be excused from whatever performance is affected by the event of Force Majeure that: (1) The non-performing Party shall, as soon as is reasonably possible after the occurrence of the event of Force Majeure, give the other Party written notice describing the particulars of the occurrence. (2) The suspension of performance shall be of no greater scope and of no longer duration than is required by the event of Force Majeure. (3) No obligations of either Party which arose before the occurrence causing the suspension of performance and which could and should have been fully performed before such occurrence shall be excused as a result of such occurrence.

#### SECTION 16 – BREACH REMEDIES

If a Party materially breaches this Agreement, the non-breaching Party may provide Notice to the breaching Party. If the breaching Party does not cure the default within thirty (30) calendar days (ten (10) calendar days in the case of a breach of the payment terms herein) of such notice, the non-breaching Party shall have the right to terminate this Agreement and/or terminate service in accordance with the Commission's Utility Customer Relations Rules. Failure to pay in accordance with this Agreement shall constitute a material breach.

#### SECTION 17 - SURVIVAL

Any provisions of this Agreement that may be reasonably interpreted as surviving the completion and/or termination on of this Agreement shall survive such completion and/or termination.

SECTION 18 – MISCELLANEOUS

18.1. Whenever possible, each provision of this Agreement shall be interpreted so as to be effective and valid under applicable law. If any provision is adjudged to be invalid, the remaining provisions in this Agreement shall remain in force.

18.2. Waivers of any right, privilege, claim, obligation, or condition shall be in writing and signed by the waiving Party. No waiver by a Party of any breach of this Agreement shall be a waiver of any preceding or succeeding breach, and no waiver by a Party of any right under this Agreement shall be construed as a waiver of any other right.

18.3. In the event that legal action in court arises between the Parties relating to this Agreement, the prevailing Party shall be entitled to recover attorney's fees and costs incurred in prosecution or defense of the legal action (including without limitation any fees on appeal).

18.4. No persons or entities shall be or shall be deemed to be third-party beneficiaries of this Agreement.

18.5. Simplot shall comply with all applicable federal, state, and local laws, including without limitation, Idaho Power's tariff approved by the Commission.

18.6. Neither Party shall be deemed an agent, partner, joint venturer, or employee of the other Party.

IDAHO POWER COMPANY

\_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

J.R. SIMPLOT COMPANY

\_\_\_\_\_

By: Michael Johnston, Vice President

Date: \_\_\_\_\_

**BEFORE THE  
IDAHO PUBLIC UTILITIES COMMISSION**

**CASE NO. IPC-E-13-23**

**IDAHO POWER COMPANY**

**ATTACHMENT 2**

**TARIFF**

SCHEDULE 33  
IDAHO POWER COMPANY  
ELECTRIC SERVICE RATE  
 FOR  
J. R. SIMPLOT COMPANY  
CALDWELL, IDAHO

SPECIAL CONTRACT DATED DECEMBER XX, 2013

SUMMER AND NON-SUMMER SEASONS

The summer season begins on June 1 of each year and ends on August 31 of each year. The non-summer season begins on September 1 of each year and ends on May 31 of each year.

MONTHLY CHARGE

The Monthly Charge is the sum of the following charges, and may also include charges as set forth in Schedule 55 (Power Cost Adjustment), Schedule 91 (Energy Efficiency Rider), and Schedule 95 (Adjustment for Municipal Franchise Fees).

	<u>Summer</u>	<u>Non-Summer</u>
<u>Contract Demand Charge</u> per kW of Contract Demand	\$2.62	\$2.62
<u>Demand Charge</u> per kW of Billing Demand but no less than the Contract Demand less 10,000 kW	\$13.76	\$7.53
<u>Daily Excess Demand Charge</u> per each kW over the Contract Demand	\$1.047	\$1.047
<u>Energy Charge</u> per kWh	\$0.023442	\$0.022994